Supreme Court, U.S.
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No. 95-278

In the Supreme Court of the United States

OCTOBER TERM, 1995

KEITH GORDON HAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER RICO FORFEITURE VERDICTS ARE SUBJECT TO DOUBLE JEOPARDY PRINCIPLES, OR THIS PETITION SHOULD BE HELD UNTIL RESOLUTION OF LIBRETTI v. UNITED STATES

For the first time in this action, the government takes the position that RICO forfeiture is punishment for a crime and that Double Jeopardy principles, therefore, do not apply. (Brief in Opp. at 6-7) The government never articulated this position to the District Court or to the Court of Appeals. To the contrary, throughout these proceedings, the government referred to the "RICO forfeiture count of the indictment," and implicitly conceded that, if the jury had rendered the required Rule 31(e) verdict, defendant would be protected by the Double Jeopardy Clause.

The government's newly advanced argument is hardly reason for this Court to deny certiorari review. If anything, the government's new argument creates yet another reason why the decision below merits review; indeed, it highlights the pressing need for this Court's intervention. For if the government is correct, then there is utter confusion in the courts below about the nature of RICO forfeiture and about the significance of a RICO

forfeiture verdict.

Swami argued to the Fourth Circuit that, pursuant to Rule 31(e) of the Rules of Criminal Procedure, he was entitled to a jury verdict on the extent of his interest subject to RICO forfeiture and that the jury would have to make its finding based upon proof beyond a reasonable doubt.[1] Relying on this Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981), Swami then argued that, unlike ordinary sentencing decisions, which are not subject to a reasonable doubt standard and are rarely made by the jury, Double Jeopardy principles apply to RICO forfeiture verdicts. The Fourth Circuit, although finding "implied consent" to a mistrial on the forfeiture count, plainly agreed with Swami's reasoning. (App. 6-8)

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[1] A number of courts have distinguished between the RICO statute and the Continuing Criminal Enterprise Act, 21 U.S.C. §§ 848 and 853, holding that a reasonable doubt standard applies to RICO forfeiture verdicts, although a preponderance of the evidence standard applies to CCE forfeitures. Compare, e.g., United States v. Pellulo, 14 F.3d 881 (3d. Cir. 1994) (RICO -- reasonable doubt standard) with United States v. Sandini, 816 F.2d 869 (3d Cir. 1987) (CCE -- preponderance of the evidence standard).

The government is now arguing that the Fourth Circuit was wrong. According to the government, forfeiture is merely a penalty and "the Double Jeopardy Clause generally does not prohibit the imposition at a second trial of penalties that were not imposed at the first." (Brief in Opp. at 7) In other words, under the government's newly articulated theory, a jury's verdict on a RICO forfeiture count is subject to no Double Jeopardy prohibitions. Thus, if a defendant's RICO conviction is reversed on appeal, at a new trial the government can seek forfeiture of assets the first jury explicitly found were <u>not</u> subject to forfeiture -- even though the jury's verdict as to those assets is the equivalent of an "acquittal" as to those assets.

This Court has never squarely addressed the nature of RICO forfeiture and has certainly never held that a jury's verdict on the extent of a defendant's interest subject to RICO forfeiture is nothing more than a sentencing decision. The courts below have reached inconsistent results about whether a jury verdict on the RICO forfeiture is constitutionally required; whether it is subject to constitutional waiver principles; whether the reasonable doubt standard

applies; and whether double jeopardy principles apply. Compare, e.g., United States v. Robinson, 8 F.3d 418 (7th Cir. 1993) (holding that waiver of jury trial must be knowing and intelligent but suggesting that the right to a jury is not constitutional); United States v. Kravitz, 738 F.2d 102, 106 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985) (suggesting that right to jury determination is not constitutional); United States v. Garrett, 727 F.2d 1003, 1012 (11th Cir. 1984), aff'd on other grounds, 471 U.S. 773 (1985) (holding that a criminal defendant has a Sixth Amendment right to a jury trial on CCE forfeiture); United States v. Patel, 816 F. Supp. 1077 (E.D. Va. 1993) (holding that Double Jeopardy applies to RICO criminal forfeiture verdicts).

The government's Brief in Opposition has made it clear that this case poses very important questions which merit this Court's review. At a minimum, the government's position demonstrates that this Court should hold this case until it decides Libretti v. United States, No. 94-7427, 115 S. Ct. 1398 (1995), granting certiorari to United States v. Libretti, 38 F.3d 523 (10th Cir. 1994) (argued on October 3, 1995), involving the extent to which forfeiture under

the Continuing Criminal Enterprise Act can be treated as a mere sentencing decision, and whether a jury trial on CCE forfeiture is constitutionally required. As the government has acknowledged, its position about criminal forfeiture in Libretti is essentially identical to the position it now asserts in response to Swami's petition. (Brief in Opp. at 6, n.3) Whether this Court ultimately accepts or rejects the government's view of forfeiture, or adopts some other position, its decision in Libretti on the nature of criminal forfeiture will probably have significant bearing on the issues posed in this petition and might well require a remand to the Fourth Circuit. Consequently, we request that this petition be held until Libretti is resolved.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE "IMPLIED CONSENT" DOCTRINE IS CONSISTENT WITH DOUBLE JEOPARDY AND CONSTITUTIONAL WAIVER PRINCIPLES, OR THIS PETITION SHOULD BE HELD UNTIL RESOLUTION OF LIBRETTI v. UNITED STATES

The Fourth Circuit treated the failure to obtain a jury verdict on RICO forfeiture as the functional equivalent of a "mistrial" on the RICO forfeiture count, and then held that Swami had implicitly consented to that

"mistrial" by failing to object when the Court dismissed the jury. (App. at 8) As Swami demonstrated in his Petition, this Court has never addressed whether a defendant can be deemed to have waived his right to have his first jury decide each count of the indictment when neither he nor his counsel has expressly consented to the declaration of a mistrial. As Swami also demonstrated, the Circuits disagree about the validity of the "implied consent" doctrine and the showing that must be made before the doctrine is invoked to deny a defendant's Double Jeopardy claim. (Petition at 16-20)

In response, the government argues that Swami's counsel had an opportunity to object to the court's failure to submit the RICO forfeiture count to the jury, and that counsel's failure to do so is sufficient to constitute a "consent" by Swami to a "mistrial" as to that count. (Brief in Opp. at 10-11) Swami was not present at the charging conference where the forfeiture issue first came up and there is no evidence in the record that he knew anything about the forfeiture discussions or knew that he had a right to a jury verdict on the extent of his interest subject to forfeiture.

In any event, the issue of importance for this Court is not whether there was an opportunity for Swami or his counsel to object -- and we submit that the record does not support the government's position -- but rather whether consent to a mistrial can ever be implied in the absence of evidence that the defendant knew he was giving up his valuable right to have his case decided by the first tribunal and acquiesced in that waiver.

That issue, which has plagued the lower courts, itself merits this Court's attention. But, at the very least, no decision on this petition should be made until the Court resolves Libretti v. United States, No. 94-7427. One of the issues in Libretti is whether a defendant's waiver of his Rule 31(e) right to a jury trial on the forfeiture issue is subject to the waiver standard announced in Johnson v. Zerbst, 304 U.S. 458 (1938). See Brief for the United States at 41-50. If this Court rejects the government's position in Libretti and determines that a criminal defendant's right under Rule 31(e) to a jury determination on forfeiture issues can only be extinguished by a "knowing and intelligent waiver," then the Fourth Circuit's determination that Swami

waived his right to have the first jury decide the RICO forfeiture count by virtue of his counsel's silence is of dubious validity. It would then be appropriate for the Fourth Circuit to reconsider its decision in light of Libretti. Consequently, this petition should be held until Libretti is decided.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or this petition should be held until resolution of Libretti v. United States, No. 94-7427.

Respectfully submitted,

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